Opinion Number 120

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

TAX DIVISION

SEARS, ROEBUCK & COMPANY :

v. : Docket No. 2463

DISTRICT OF COLUMBIA :

:

OPINION

This matter comes before the Court on petitioner's motion for summary judgment, the opposition of the respondent and the reply of the petitioner. Petitioner contends that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law.

The case at bar was tried May 24, 25 and 26, 1978 before another Judge of this Court, who did not render an opinion prior to his being elevated to the United States District Court. However, the prior Judge in a letter to counsel dated May 11, 1979 stated:

> "There is really no dispute as to the facts in the case even though the Court took testimony in this regard. I find that the findings of fact set forth by counsel for the petitioner in its brief is accurate based upon what has been submitted and heard by the Court."

While this Court did not hear the testimony and evidence that was adduced, it has read the complete record in this case and the record (Tr. at 251) confirms the absence of any dispute as to the material facts of the case with the following colloquy between the Court and counsel for the respondent.

> THE COURT:..... There is really no factual dispute, because the government hasn't offered anything to controvert those facts, so the facts are pretty well set; are they not.
>
> Mr. Amato (for respondent): Yes, Your Honor, they are.

The Court finds the undisputed facts to be as follows: Petitioner, a national retailing outlet, contracted with certain newspapers to periodically place advertisements in their daily editions. The advertisements at issue were supplements printed in Connecticut by an independent printer, shipped via common carrier F.O.B. to newspaper loading docks in the District of Columbia, or were advertising supplements printed in the District of Columbia by the Washington Star and delivered to the Washington Post and Daily News. They were then inserted into the various newspapers which were delivered to the general public as a single unit.

On the basis of the above undisputed facts, two questions of law are presented: (1) Whether the above mentioned advertising supplements printed out of state are subject to the District of Columbia Compensating Use Tax, D.C. Code 1973 Supp. §47-2701 et seq. and (2) Whether advertising supplements printed in the District of Columbia by the Washington Star and delivered to the Washington Post and Daily News for inclusion in the regular editions of their papers are subject to the same use tax.

(1)

Advertising Supplements Printed Outside The District of Columbia

Petitioner challenges the tax imposed during the period April 1, 1971 to March 31, 1974, stating there was not a taxable use by Sears, that if there were any use by Sears, the use would be exempt, that the tax was illegally assessed and that the tax is unconstitutional on First Amendment, due process and interstate commerce grounds.

The relevant provisions of the compensating-use tax statute read as follows:

> "Beginning on and after August 1, 1949, there is hereby imposed and there shall be paid by every vendor engaging in business in the District

> and by every purchaser a tax on the use, storage, or consumption of any tangible personal property and services sold or purchased at retail sale." D.C. Code (1973) §47-2702.

For purposes of the compensating-use tax, use is defined as

> "the exercise by any person within the District of any right or power over tangible personal property and services sold at retail, whether purchased within or without the District of Columbia by a purchaser from a vendor." D.C. Code (1973) §47-2701(6).

Sears in effect contends there has been no use, storage or consumption of the advertising supplements within the District of Columbia, which would give rise to the imposition of a tax under §47-2702 of the D.C. Code.

Firstly, petitioner states that the advertising supplements were consigned and delivered by common carrier to the newspapers under an F.O.B. bill of lading, and that under the terms of delivery, title and risk of loss passed to the newspapers at the point of delivery in the District of Columbia. Petitioner argues that this transfer of title does not constitute a use, and that once this transfer was effected Sears had no power over the supplements.

Secondly, petitioner contends that its right to recall does not constitute a use.

Finally, petitioner contends that merely causing the supplements to be delivered into the District does not constitute a use and that there must be an actual exercise of power over the property before there can be "use" within the meaning of the statute.

Petitioner cites Hoffman-LaRoche, Inc. v. Porterfield Tax Commissioner, 160 Ohio St.2d 153, 243 N.E. 2d 72 (1968). In that case petitioner, LaRoche Pharmaceutical Laboratories, promoted its products by mailing samples and other materials from outside Ohio to various doctors and hospitals inside Ohio.

The Court considered whether appellee's choice to effectuate delivery by mail rather than by common carrier precluded appellee from divesting itself of possesion and control where federal postal regulations provided the right to recall the mail anytime before delivery.

The Court held that the right of recall as provided for in the postal regulations, would not operate to impose a tax. The Court noted that delivery of a gift is completed at the time of deposit in the mail for delivery and further that in that instance, recall would be inconvenient and expensive. The Court also noted that no evidence was introduced to show that there had been or that appellee had attempted a recall.

Petitioner also cites Miller Brewing Co. v. Schneider, 2 Ohio State Tax Reporter (CCH) ¶60-170.04 (1969). This was a case in which Miller purchased promotional materials outside Ohio and delivered them to common carriers outside Ohio for consignment to various independent distributors of Miller's products in Ohio. Miller prepaid the freight charges and exercised no control over the use of the materials once they came into Ohio. The Court held that an out of state supplier of advertising materials which promotes the sale of its products cannot be subject to a use tax where it relinquishes ownership, possession and control of the materials outside Ohio.

Respondent maintains that petitioner did exercise a right or power over the advertising supplements relying on Miller v. Korshak, 219 N.E. 2d 494, 35 Ill. 2d 86 (1966) and that petitioner should not be able to immunize itself from taxation by employing others to do that which would be taxable if done by petitioner itself citing Deere and Company v. Allphin, 49 Ill. App. 2d 164, 364 N.E. 2d 117 (1977).

In Korshak, Miller Brewing Co., a Wisconsin corporation, promoted its products by providing for the manufacture of certain point-of-sale advertising items, such as neon signs,

clocks and other devices. The manufacturers retained the items until Miller requested that they be shipped to Illinois wholesalers, whereupon the manufacturers would deliver the items to independent carriers, shipping charges prepaid and chargeable to Miller, for delivery to wholesalers in Illinois. Miller did not inventory the items nor place them on its books of account. While the Illinois court found the advertising items to be subject to the tax, this case is of no help to the respondent because it was decided on the question of who owned the advertising items, the court noting that Miller did not contend that it either sold or made a gift of the items to the wholesalers in Illinois, whereupon the court concluded that the ownership of the items must have remained in Miller. Since Miller owned the signs and used the signs by causing them to be put in places where people looked at them, this bestowed a benefit on Miller. "The power to allow property one owns to be used for one's benefit in this manner is an 'exercise' of 'an incident of ownership.'" id. at 498.

Likewise, Deere and Company v. Allphin, supra, is of no support to respondent's position. In that case, plaintiff (manufacturer) purchased from a commercial printer in Illinois brochures which it ordered delivered to its agent in Illinois where they were placed in envelopes, addressed, sorted and mailed to customers both within and without Illinois. The appellate court rejected plaintiff's claim that it was not subject to the use tax, holding that it exercised ownership over the brochures in Illinois and therefore the brochures were subject to the use tax. It also held that Deere exercised a power incidental to its ownership through its agent when it directed the agent to address, collate and mail the advertising material. Further it stated that until the brochures were prepared for mailing, the destination of each brochure had not been determined and any one could have been destined for an Illinois recipient. The court stated that the agent functioned as a processor not a

common carrier and th the printed matter did not become part of interstate commerce until they were delivered to the Post Office. Again, the Allphin case turned on the question of ownership, the court having found that the plaintiff was the owner of the brochures in the taxing state of Illinois. Also the question of whether there was "use" turned on the acts of the taxpayer within the originating state rather than the state of destination as is the instant case. If, as respondent would urge, the logic of this case were to be applied to the case at bar, the taxing authority would lie in the jurisdiction where the preparation for mailing occurred, Connecticut, and would terminate at the point of entry into the stream of interstate commerce and no basis for imposition of the District of Columbia compensating-use tax would attach under this principle.

Thus it appears that no conflict exists in the approaches adopted by Ohio and Illinois. Both states seem to be in agreement that it is a question of fact as to whether a complaining taxpayer has retained ownership or has relinquished ownership over personal property within the taxing state.

The courts in Schneider and Hoffman-LaRoche acknowledged that since title, ownership and control were relinquished outside of the jurisdiction there could be no use incidental to ownership because there was no ownership within the state and similarly, the courts in Konshak and Allphin found that there had been retention of ownership and control within the taxing jurisdiction thus triggering imposition of the use tax. In the instant case petitioner exercised no right or power over the supplements once they arrived in the District of Columbia. Even if it could be shown that petitioner retained the right to recall any or all of the supplements prior to the publication of the newspapers,[1/] that would be insufficient basis on which to

1/ Petitioner had such a right but never exercised it. Petitioner's brief at 45.

impose the use tax. See District of Columbia v. W. Bell & Company, Inc., 420 A2d 1208 (DCCA, decided September 22, 1980). The petitioner having exercised no ownership or control over the supplements in the District of Columbia, then of course these supplements are not subject to the use tax.

Based on the cases cited above, this Court concludes as a matter of law, that the District of Columbia could not impose a use tax on the printing of the advertising supplements in Connecticut and it certainly could not impose a use tax on these supplements while they were in transit to the District of Columbia (interstate commerce). Since title was transferred to the newspapers upon delivery to their loading docks, no use tax can be imposed by the District of Columbia on the petitioner.

These advertising supplements are not subject to the District of Columbia Compensating Use Tax for another reason. They are exempt from the use tax under §§47-2706(b) and 2605(g). These sections read as follows:

§47-2706, Exemptions.

(b) "Sales exempt from the taxes imposed under Chapter 26 of the title".

§47-2605, Exemptions.

(g) "Sales of newspapers and ...."

Since sales of newspapers are specifically exempted from the Compensating Use Tax under §47-2706(b) and §47-2605(g), it is clear that upon the arrival of the supplements in the District of Columbia at the loading docks of the newspapers, they became "part of the melange of news accounts, editorial opinion, sports stories, advice and gossip columns, advertising, comics, etc., commonly understood in modern times by the generic term 'newspaper'." Sears Roebuck and Company v. State Tax Commission, 345 N.E. 2d 893, 895 (1976). See also Friedman's Express, Inc., v. Mirror Transport Company, 71 F. Supp. 991 (1947), aff'd, 169 F.2d 504 (3rd Cir. 1948).

Therefore the Court concludes that the advertising supplements printed outside the District of Columbia are not subject to the Compensating-Use Tax Statute and that the advertising supplements are also exempt under D.C. Code §§47-2706(b) and 2605(g).

(2)

Advertising Supplements Printed in the District of Columbia by the Washington Star

The next question to be decided by this Court is whether advertising supplements printed in the District of Columbia by the Washington Star and delivered to the Washington Post and Daily News for inclusion in the regular editions of their papers are subject to the same Compensating Use Tax, or stated another way, whether the printing of the advertising supplements in the District of Columbia would subject them to the tax mentioned above.

The Court concludes as a matter of law that even though advertising supplements were printed in the District of Columbia, it would not change their status so as to subject the petitioner to pay a use tax.

While this conclusion might seem to be a contridiction to the holding in Deere & Company v. Allphin, supra, the instant case is different for two reasons:
(1) advertising supplements have been held to be a part of a newspaper (Friedman's Newspaper, Inc., v. Mirror Transp. Co., Inc., supra) and (2) newspapers enjoy an exemption under §§47-2706(b) and 2605(g), D.C. Code (1973)

The Deere case involved advertising borchures which plaintiff caused to be printed, delivered to an agent where they were prepared for mailing both within and without the State of Illinois. The Court held that since the plaintiff exercised ownership over the brochures in Illinois, they were

thus subject to the use tax. The difference between this case and the instant case is that the advertising brochures in Deere could not by any stretch of the imagination be considered a part of a newspaper, while in the instant case the advertising supplements were definitely a part of the newspapers in question, and thus are entitled to an exemption under our statute.

In an identical case involving the same petitioner, Sears, Roebuck and Company v. State Tax Commission (1976), 345 N.E. 2d 893, the Supreme Court of Massachusetts held that advertising supplements which bore the newspaper logo, inserted into designated editions of a newspaper and distributed with the newspapers, constituted parts of a newspaper and thus were not subject to the sales or use tax. The Court went on to further say at page 895:

> ".....and we think the fact that the advertising supplements were not printed by the newspapers does not change the result."

The reasoning in the above case seems sound, logical and persuasive and this Court hereby adopts this decision as being controlling.

It is therefore the opinion of this Court that the advertising supplements, whether printed within or without the District of Columbia, come within the definition of the term newspaper and thus are exempt from the Compensating Use Tax, §47-2706(b) and 2605(g), D.C. Code (1973).

Since the Court has arrived at the above decision, it sees no reason to decide the constitutional and other questions raised by the parties.

Counsel for the petitioner will submit full findings of facts and conclusions of law and an order in accordance with this opinion.

JUDGE JOHN D. FAUNTLEROY

March 26, 1981

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

SEARS, ROEBUCK AND CO., Petitioner,	)	
v.	)	Docket No. 2433
DISTRICT OF COLUMBIA, Respondent.	)	

Judge Saunders 1981

ORDER

This matter was tried before another Judge of this Court on May 24, 25 and 26, 1978. That Judge was thereafter elevated to the United States District Court. Counsel for parties have orally stipulated, agreed and requested that the Court render a trial decision based on the trial record, the briefs filed by the parties, the amicus briefs filed by the American Newspaper Publishers Association and the Washington Post, and the oral argument by counsel for the respective parties. In accordance with Section 47-2403, D.C. Code (1973 Ed.) and Rule 52 of the Civil Rules of the Superior Court, the Court has entered Findings of Fact and Conclusions of Law and this Order.

Furthermore, this matter also comes before the Court for decision on Petitioner's Motion for Summary Judgment, pursuant to Rule 56 of the Civil Rules of the Superior Court, and upon consideration of Petitioner's Motion for Summary Judgment, the Memorandum of Points and Authorities filed by the Respondent in opposition to said Motion and the Petitioner's Reply thereto, the exhibit attached to said motion, and after review of the total trial record, the briefs of the parties and after hearing the arguments of all counsel, the Court finds that there is no genuine issue as to any material fact and that as a matter of

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law, the Petitioner's Motion for Summary Judgment should be granted.

Therefore, it is, this 11th day of May, 1981

ORDERED, that Petitioner's Motion for Summary Judgment be and the same is hereby granted, and it is

FURTHER ORDERED, that the Petitioner's claim for a refund of Sales and Use Taxes and interest thereon, assessed by the District of Columbia on advertising supplements for the taxable period from April 1, 1971 to March 31, 1974 and paid under protest to the District of Columbia, be and the same is hereby granted, and it is

FURTHER ORDERED, that the District of Columbia refund to the Petitioner the sales and use taxes collected from the taxpayer, amounting to $47,934.93 and interest on the assessment paid by the taxpayer of $23,464.09, and it is

FURTHER ORDERED, that interest of four per centum per annum on the amount to be refunded to the taxpayer is hereby awarded to the taxpayer, pursuant to Section 47-2618, D.C. Code (1973 Ed.), from February 16, 1977 (the date the taxpayer paid the tax assessment) to the date the District of Columbia refunds the taxes and interest previously collected from the taxpayer.

JUDGE JOHN D. FAUNTLEROY

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

SEARS, ROEBUCK AND CO., Petitioner,	)	
v.	)	Docket No. 2463-77
DISTRICT OF COLUMBIA, Respondent.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PRELIMINARY STATEMENT

The taxpayer contests the retroactive gross receipts assessment by the District of Columbia of a sales or use tax, paid by Sears under protest. The tax assessment was based on the cost of printing certain newspaper advertising supplements during the period from April 1, 1971 to March 31, 1974. The taxed supplements were either (1) printed by the Washington Star and delivered to the Washington Post and Daily News for circulation to newspaper readers; or (2) printed by an out-of-District independent printer, shipped by the printer via common carrier to the newspapers. The advertising supplements were assembled by the newspapers into the newspapers' editions and distributed to the newspaper readership.

The case at bar was tried before another Judge of this Court on May 24, 25 and 26, 1978. That Judge did not render an opinion prior to being elevated to the United States District Court.

At oral argument before this Court, counsel for the respective parties orally stipulated and agreed to submit this matter to the Court for a decision on the Motion for Summary Judgment filed by the Petitioner and for a trial decision based

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on the trial record, the briefs and the oral argument of counsel for the respective parties.

The following findings of fact and conclusions of law are made in accordance with Section 47-2403, D.C. Code (1973 Ed.).

FINDINGS OF FACT

1. Petitioner, Sears, Roebuck and Co., is a New York corporation with its principal place of business in Chicago, Illinois. Petition ¶ 1, admitted; Tr. at 22.

2. Sears has been authorized to do business in, and has been doing business in, the District of Columbia since 1929. Sears currently has three retail stores in the District of Columbia. Tr. at 22.

3. Sears is a major national retailer engaging in the sale of a wide range of articles throughout the country. Petition ¶ 8(A), admitted.

4. Sears advertises in a wide variety of media as part of a national advertising program, including newspapers, radio, television and direct mail, pursuant to a fixed advertising budget. Petition ¶ 8(A), admitted; Tr. at 27, 50-51.

5. Newspapers offer lower rates per line for advertisers who annually contract to purchase bulk advertising space in the newspaper, measured as a bulk quantity of agate linage (14 lines to an inch). Petitioner's Exhibit Nos. 12, 13, 14 (Post bulk contract and rate book); 47, 48, 49-50 (Star bulk contract and rate book); Tr. at 84.

6. Pursuant to annual advertising contracts between Sears and the Washington Post ("Bulk Space Retail Display Contracts"), Sears committed itself to purchase a certain minimum

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amount of advertising space per year in the Washington Post, i.e., 1,250,000 lines, measured by agate linage (14 lines per inch). In those contracts Sears also committed itself to purchase a weekly minimum of 56 columns of advertising space. Petitioner's Exhibit No. 12.

7. The Washington Post Bulk Space Retail Display Contracts for the taxable period in question provided that:

> Failure of advertiser to purchase the minimum number of agate lines agreed to be purchased within each yearly period shall be considered a breach of contract by advertiser, and contract shall be terminated effective with last day of the yearly period in which such failure occurs. Petitioner's Exhibit No. 12.

8. The advertising contract between the Washington Star and Sears ("Retail Advertising Contract"), also committed Sears to an annual minimum amount of advertising space in the Star. Petitioner's Exhibit Nos. 47, 48.

9. The Star's Retail Advertising Contracts for the taxable period stated that:

> If for any reason less than the number of lines of space contracted for is used within any yearly period, this contract is automatically cancelled, and we further agree to pay for the actual number of lines used at the rate called for by the STAR's rate card in force during the period such advertising is used. Petitioner's Exhibit Nos. 47, 48.

10. The advertising contracts between Sears and the Daily News were similar to the advertising contracts between Sears and the Star and the Post. The Daily News' contract also contained an agreement by Sears to advertise in the News a minimum annual amount and that if such minimum was not met by Sears, then that advertising contract with the News was automatically terminated. Petitioner's Exhibit Nos. 77-78, 80.

11. The Bulk Space Advertising Contracts between Sears and the newspapers also specifically incorporated by reference

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into the contracts the newspapers' retail advertising rate books in which various forms of advertising packages were offered to retail advertisers, including preprinted advertising supplements. Petitioner's Exhibit Nos. 12, 47, 48.

12. For the period from April 1, 1971, to March 31, 1974 (hereinafter referred to as the taxable period), Sears paid to the District of Columbia sales and use taxes totalling $5,733,000.00. Tr. at 23.

13. During the taxable period, Sears procured the printing of certain advertising supplements (newspaper preprints) to be included in and distributed as parts of various editions of Washington, D.C. newspapers as part of its national advertising program. Petition ¶ 8(B), admitted. A "preprint" is, simply, something in the newspaper that is printed in advance. Tr. at 226.

14. The advertising supplements upon which the tax was assessed were created exclusively for the newspapers and solely for the purpose of being included with the newspapers for distribution to the newspapers' subscribers. Tr. at 27, 71.

15. On December 20, 1974, the District of Columbia issued to Sears a notice of sales and use tax deficiency in the amount of $47,934.93 assessed on Sears' alleged use within the District of Columbia of advertising supplements printed by an out-of-state printer and certain advertising supplements printed by the Washington Star for the Post and the Daily News. Petitioner's Exhibit No. 1; Petition ¶ 8, portions admitted; Tr. at 24, 26.

16. Prior to receipt of said notice of tax deficiency, Sears had no notice that the advertising supplements would be the subject of a use tax. Tr. at 25.

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17. The practice of advertising by preprinted newspaper supplements has been a part of Sears' advertising program at least as early as 1958. Tr. at 47-48, 95, 96.

18. Sears was audited by the District of Columbia Government during the mid-1960's and the D.C. Government did not attempt to levy a sales or use tax on preprinted advertising supplements. Tr. at 25, 47, 48.

19. On February 9, 1977, the District of Columbia assessed a use tax against Sears for the taxable period in the amount of $47,934.93, based on the cost of printing the advertising supplements, plus interest in the amount of $23,464.09, with penalties waived. Petition ¶ 4, admitted; Petitioner's Exhibit Nos. 1-3, 4, 6, 9; Respondent's Answer to Interrogatory No. 32; Tr. at 24.

20. On February 16, 1977, Sears paid, under protest, said assessment plus interest. Petition ¶ 6, admitted; Petitioner's Exhibit Nos. 4, 7-8; Tr. at 25.

21. During the taxable period, the vast majority of the supplements were printed by Eastern Color Printing Co., Waterbury, Connecticut, an independent printing contractor, pursuant to oral contracts under which Eastern printed the advertising on newsprint paper and delivered the supplements via common carrier, selected by the printer with freight prepaid by Eastern, F.O.B., to the newspaper loading docks consigned to the respective newspaper (Post, Star or News) with which the supplements were to be assembled and distributed. Tr. at 26-28, 71-72, 95; Petitioner's Exhibit Nos. 24, 25, 29-35, 37-38, 41, 43, 68, 70-74.

22. Also during the taxable period, the Washington Star newspaper printed advertising supplements, some of which were inserted into and distributed as part of the Star, some (called overruns) of which were delivered by the Star to the Washington

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Post (as agreed to by the traffic departments of the respective newspapers, Tr. at 69), and some to the Washington Daily News for insertion into their newspapers and for distribution. Tr. at 26, 67; Petitioner's Exhibit Nos. 55-67, 76. The same supplement thus was a special section in the Star and a preprint special section in the Post and News. Tr. at 67.

23. The District of Columbia does not contend that the printers of the taxed advertising supplements were acting as agents, servants or employees of Sears, Roebuck and Co. Respondent's Amended Answer to Interrogatory No. 39.

24. Certain specific requirements for the advertising supplements were established by the newspapers. The retail advertising rate book established the type of advertising available, including size, number of pages and format. Petitioner's Exhibit Nos. 14, 49. By oral agreement and subsequent written confirmation, the newspapers established certain other specifics, including quantity, delivery date and other delivery instructions, and the requirement that on each supplement appear the words "supplement to the Washington" Post, Star or News, which ever the case may be, and the date of publication with the newspaper. Tr. at 89-91, 107, 160-61, 214-15, 228; Petitioner's Exhibit Nos. 15, 20, 55, 60.

25. Prior to negotiating and ordering the printing of the advertising supplements by the independent printing contractor, representatives of Sears and the Post, Star or Daily News would meet weekly and monthly; Sears would select the appropriate advertising package contained in the newspaper's retail advertising rate book; and Sears would reserve that advertising space for a specific date to be published with the newspaper. At those meetings, the said representatives orally

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agreed, as to the advertising package, that the subject advertising supplements would be published and distributed on a date certain, that the advertising supplements would be of a certain size, that each supplement would consist of a certain number of pages, and that the first page of the supplement would contain a specified logo, to wit: "an advertising supplement to" followed by the name of the newspaper and the day and date of the publication of the newspaper in which the advertising supplement was a part. The representatives of Sears and the respective newspapers would also orally agree as to the date by which the advertising supplements were to be delivered to the loading docks of the respective newspapers. The parties would agree with respect to delivery instructions, shipping instructions, and as to the number of advertising supplements which would be published by the newspapers. While the terminology and procedures followed by the respective newspapers were not identical, they were, as testified by the witnesses, substantially similar in all important aspects. Petitioner's Exhibit Nos. 13-15, 18, 20, 49-55, 60, 76; Tr. at 73, 75, 89-90, 228-29.

26. In accordance with the newspapers' requirements, the preprinted advertising supplements carried on the front page a "logo" at the masthead of each supplement to be distributed as a part of the newspaper, bearing the words "supplement to the Washington Post" or "supplement to the Washington Star" and the date of publication. Tr. at 67-68, 177, 215.

27. Sears bought newspaper space measured in agate lines. Newspaper advertising supplements are measured by number of pages, size of pages, number of columns to page (8) and number of agate lines (14 to column inch). Tr. at 72-73.

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28. The linage figure obtained from the measurements of the advertising supplement pages was credited towards the minimum space stated in the Bulk Space Advertising Contracts between the Post, Star and News and Sears. Tr. at 66, 73-74, 88, 100, 131-32, 165-66, 183-84, 219-21, 228-29.

29. The difference in the price between purchasing advertising space in the main section of the newspaper and in the preprints is due to the fact that the newspaper does not set the type for the preprinted advertisement. The rate charged an advertiser by a newspaper for advertising preprints includes handling, pressroom expense, administrative work, overhead and profit. Tr. at 184, 218.

30. After they were printed, the supplements were shipped by common carrier from the out-of-state independent printing contractor, consigned to the newspaper, and delivered F.O.B. to the newspaper loading dock. See, e.g., Petitioner's Exhibit Nos. 29-32.

31. Concerning the Star, the preprinted advertising supplements for the Wednesday, Friday and Sunday editions arrived at the Star's loading dock, usually by the prior Monday. The Star worked during the week on mechanical insertion of the Sunday preprints into the Sunday comic sections, which were then kept by the Star in its mailroom. On Sunday the newsboy put the preprint sections, including the comic sections, together with the main section before distributing the newspaper. Jumpers on delivery trucks inserted the advertising supplements into the daily editions due to use of the Star's mechanical insert equipment for inserting the Sunday editions. Tr. at 150-51, 162-65, 175. In 1973, the Star obtained additional mechanical insertion equipment, which inserted 85 per cent of the preprints

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into the newspaper at the same time the main section of the newspaper was being printed. Tr. at 163-65.

32. In the case of the Post, many preprinted advertising supplements arrived on Monday mornings at the Post's loading dock for insertion processing the same day. If they arrived ahead of schedule, because of space limitations, the Post sent them to a warehouse, located in Alexandria, Virginia, owned by the Post, until the Post's mailroom could begin inserting them. Advertising supplements were inserted into the daily editions by newsboys because the mechanical equipment was in use all week for assembly of the Sunday edition. Many preprints are received by the Post within 72 hours of processing. Tr. at 220, 230; Petitioner's Exhibit Nos. 29-35. The Sunday editions were assembled by machine, and the daily editions were assembled by the carrier boys. Tr. at 220.

33. On delivery to the newspaper loading docks, the newspapers had possession and control over the advertising supplements. At no time did Sears exercise control, keep or retain possession of the supplements after they were printed and delivered to the newspaper or before insertion into the newspaper. Tr. at 28-29, 70, 92-94, 161-62, 174, 230.

34. At no time did Sears or any person on Sears' behalf modify, alter, or change the physical appearance or characteristics of the supplements after their printing. Tr. at 94.

35. Sears did not have possession or control over the use of the supplements within the District. Tr. at 92.

36. The supplements were not stored in any facility owned or controlled by Sears. Tr. at 93.

37. The supplements were stored by the newspapers. Tr. at 175, 230.

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38. Pursuant to certain Retail Store Advertising Purchase Orders, under which the newspaper was the Seller and Sears was the Purchaser, the newspapers undertook the following responsibilities:

> Seller agrees to protect, defend, hold harmless, and indemnify Purchaser from and against any and all claims, actions, liabilities, losses, and/or expenses arising out of any actual or alleged infringement of any patent, trademark or copyright by any materials or articles furnished to Purchaser hereunder, or arising out of any actual or alleged death or injury to any person, any damage to any property or any other damage or loss by whomsoever suffered, claimed to result from any actual or alleged defect in such materials or articles, whether latent or patent, or arising out of the actual or alleged violation by the manufacture or sale of any such materials or articles of any statute, ordinance, or administrative order, rule or regulation. . . .
>
> Seller's performance hereunder shall be as an independent contractor, and neither Seller nor any employee, servant or agent shall at any time be or become an employee of Purchaser by virtue of this Order or anything done pursuant thereto.

Petitioner's Exhibit Nos. 16, 19, 21, 28, 39, 42, 56, 59, 62-63, 69, 83-85 (Terms and Conditions on Reverse).

39. The only copies which Sears had in its possession were those to be used in Sears' D.C. stores by store personnel and walk-in customers, Tr. at 92-93; these copies were not to carry the newspaper logo, Tr. at 35-36; and upon these copies Sears paid a sales or use tax. Tr. at 36, 88. The taxes paid by Sears on the store copies are not at issue in the case at Bar.

40. The assembly process was within the exclusive purview of the newspapers; Sears exerted no control over the process by which the advertising sections were inserted into the newspaper. Tr. at 28, 161.

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41. The Sears advertising supplements were "Run of the Paper" (ROP); they were placed within the newspaper where the newspaper elected to place them. Tr. 63, 131-32.

42. The preprinted advertising supplements were considered ROP advertising as much so as if printed anywhere else in the newspaper. Tr. at 131-32.

43. The newspapers did not consider themselves as agents for Sears in the assembly process. Tr. at 160-61. The method and manner of assembly were determined by the newspaper circulation department. Tr. at 161.

44. The District has admitted that no agent, servant or employee of Sears was involved in the process of assembling the advertising sections into the newspapers. Respondent's Amended Answer to Interrogatory No. 37.

45. The supplements were delivered with the newspapers both inside and outside of the District, in roughly equal proportions to subscribers in Maryland, Virginia, and the District. Tr. at 26, 138.

46. It is the sole responsibility of the newspaper to determine method and manner of distribution of the newspaper advertising supplements to newspaper subscribers. Tr. at 29, 93, 160, 219.

47. The newspapers did not consider themselves as agents for Sears in the distribution of newspaper advertising supplements. Tr. at 160-61.

48. The District has admitted that no agent, servant or employee of Sears was involved in the distribution of the supplements. Respondent's Amended Answer to Interrogatory No. 38.

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49. In October, November and December of 1975, the Washington Post was involved in a labor dispute during which time certain Sears advertising supplements were not delivered with the Post because of the labor problems. The Post reimbursed Sears for additional expenses incurred by Sears as a result of the labor dispute, including the cost to Sears of printing of the advertising supplements by the independent printing contractor. Petitioner's Exhibit No. 46; Tr. at 76.

50. By reason of Sears' contractual arrangements with the newspapers, Sears had purchased and reserved for specific dates advertising space in the newspaper for the sole purpose of disseminating commercial information to subscribers and purchasers of the newspaper. Tr. at 27, 71, 90-91, 228-29; Petitioner's Exhibit No. 18.

51. Consumption of a newspaper advertising supplement occurs when it is received by the newspaper subscriber and either read or thrown away. Tr. at 93.

52. The Star and the Post had limited printing plant capacity and did not have the capability to print rotogravure, offset, color on both sides of a page, hi-fidelity advertisements, spectacolor advertisements, or advertisements requiring clear photographic reproduction or the detail reproduction of fine fabric. Also, the newspaper color reproduction is limited as to quality and variety of colors. Finally, the newspapers can only print in two sizes, full size and tabloid, and cannot print mini-tabs and flexis. Consequently, any printing requiring the above must be done by independent printing contractors. Tr. at 54-56, 61-63, 93-94, 146-47, 162, 213.

53. The reasons that advertisers, including Sears, use independent printing contractors to produce preprinted newspaper

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advertising supplements, rather than having all advertising printed by the newspapers themselves, include the following:

(a) With supplements printed by independent contractors, there is "better quality, more accuracy, fewer opportunities for error in this day of consumerism, particularly where we have to exercise very strict control on copy, and because it is a better and more productive product." Tr. at 93-94 (Testimony of Francis O'Hara, Sears).

(b) Sears prefers the rotogravure printing process because of its high-quality color reproduction, or as a second choice the offset printing process, but neither Washington, D.C. newspaper had the equipment. Tr. at 54, 59.

(c) The Washington newspapers had only the letter-press printing process, a process in use since the sixteenth century, which has limited quality and color reproduction capabilities. Tr. at 60.

(d) The newspapers' own printing facilities were limited in color printing capability in the number of colors that could be offered to advertisers. Tr. at 55-56.

(e) Advertisements containing photographs and textured material do not reproduce well with letterpress. Tr. at 213.

(f) With respect to the printing capabilities of the newspapers, the following exchange took place between counsel for the taxpayer and Mr. O'Hara, testifying for the taxpayer:

> Q Do the local newspapers have the facilities for printing all of the local ads that Sears needs, all the local advertisements?
>
> A. I am sure newspapers probably will say that they do. However, the facts belie that. The Sunday paper contains so many supplements probably that the Washington Post would be incapable of producing them even in black and white. Tr. at 62-63.

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Likewise, the Star did not have the facilities. Tr. at 162. The newspapers did not have the equipment to print special sections. Tr. at 147.

(g) The newspapers did not have the equipment to print all of the various types of advertising offered in their rate books. Tr. at 162.

54. The merchandise advertised in the Sears' supplements was of the same general character as that advertised in the main section of the newspaper; there was no difference in content. Tr. at 30, 32, 94, 209; Respondent's Amended Answer to Interrogatory No. 25.

55. The Sears advertising supplements were included in the issues of the Post and Star which were mailed to the newspapers' regular subscribers. Tr. at 161, 219.

56. The Sears advertising supplements were included in issues of the Post and Star filed with and accepted by the Postmaster as part of the newspaper for second-class newspaper rates and handling. Tr. at 167, 222; Petitioner's Exhibit No. 100.

57. In the newspaper publishing industry, a newspaper is defined to consist of all printed matter, Tr. at 142, "everything that is in it that is delivered to the subscriber," Tr. at 207, including news matter, all forms of advertising, the comic sections, rotogravure magazines, special supplements of any nature including advertising supplements, and all preprinted sections. Tr. at 141-43, 190, 207-09.

58. As for a section of the newspaper printed by an independent printing contractor, including an advertising section, "irrespective of where it is produced it is part of the newspaper

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if it goes with the newspaper." Tr. at 191 (American Newspaper Publishers Ass'n witness definition).

59. In order to keep a record of what has appeared in the newspaper, for historical and research purposes, each edition of a newspaper is microfilmed by the newspapers. Tr. at 182, 217.

60. Both the Washington Post and the Star newspapers regularly microfilm preprinted advertising supplements as part of their newspaper record. Tr. at 159, 217.

61. The Post copyrights its editions and includes advertising supplements as part of the newspaper edition copyrighted. Tr. at 216.

62. Preprinted sections of the newspaper, including advertising sections, are sold by the newspapers to subscribers as part of the newspaper. Tr. at 219.

63. Subscribers to the newspaper purchase and are entitled to all sections of the newspaper, including advertising supplements; upon subscriber complaints about missing advertising sections, the newspaper makes delivery of the missing sections. Tr. at 151, 215-16, 227-28, 233.

64. Post dealers make deliveries of advertising supplements by car to customers who complain to the circulation department that they did not receive the advertising supplement with the newspaper. Tr. at 233.

65. The newspapers have editorial control over all sections of the newspaper, including preprinted advertising sections, and exercise this control over all newspaper sections in matters of taste, obscenity, and false and misleading material appearing in advertisements. Tr. at 152, 158, 175-76, 180, 216-17, 234.

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66. The Washington Post reviews advertisements appearing in supplements for libel. Tr. at 217.

67. The Washington Star will refuse to carry advertising in the form of preprinted sections from advertisers about whom it receives persistent complaints from subscribers, including the complaint of nondelivery of merchandise or services. Tr. at 176.

68. The linage from advertising supplements printed by independent contractors, regardless of whether under contract with a newspaper or an advertiser, is treated as part of the newspaper. Tr. at 191.

69. In reporting advertising linage to those who gather and publish industry statistics, the Post and Star report their linage in advertising supplements as part and parcel of the total advertising linage. Tr. at 146-47, 158, 159, 188, 191, 202, 216.

70. Of the great variety of advertising methods and media available to and in use by advertisers, the District has sought to impose a sales or use tax only where newspaper advertising supplements are printed by an independent printer under contract with an advertiser. See Respondent's Answers and Amended Answers to Interrogatories 17, 18, 23, 44, 45.

71. If a distributing newspaper contracts with an independent printer to print an advertising supplement for an advertiser, there is no sales or use tax. Respondent's Amended Answer to Interrogatory No. 45; Answer to Interrogatory No. 14.

72. If the newspaper which is to distribute an advertising supplement prints that supplement itself for the advertiser, there is no sales or use tax. Respondent's Answer to Interrogatory No. 44.

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73. Many other sections of a newspaper, in addition to advertising sections, are preprinted by independent printing contractors, such as the rotogravure magazines (Post Magazine, Star Home-Life), comic sections, and TV booklet. There is no sales or use tax imposed on the sale or use of these preprints, nor is there a sales or use tax imposed upon the advertising appearing in them. Tr. at 54, 85-86, 123-24, 146, 212. Respondent's Amended Answers to Interrogatories Nos. 18, 23.

74. One of the forms of advertising offered by the newspapers in their rate books (see Petitioner's Exhibit Nos. 13-14, 49) is high-fidelity (hi-fi), a high-quality process. Under this form, an advertiser contracts with an independent rotogravure printer to print the ad on one side of a continuous roll of newsprint. It is then delivered to the newspaper; the newspaper has the option to print something on the other side; and the hi-fi preprint is inserted into the newspaper for delivery to subscribers. Tr. at 60-62, 145, 210.

75. There is no sales or use tax imposed on the hi-fi advertising preprints which are printed by independent printers under contract to the advertisers. Tr. at 61.

76. With respect to the Sears advertising supplements printed by the Star, no sales tax was imposed on supplements printed by the Star and delivered with the Star, but there was a tax on the supplements printed by the Star and sent by the Star to the Post for delivery with the Post. Tr. at 131-34.

77. There is no sales tax on advertising appearing in the main sections of the newspapers. Tr. at 29, 94; Respondent's Answer to Interrogatory No. 30.

78. There is no sales or use tax on advertisements in the electronic media of radio and television. Tr. at 29, 53; Respondent's Amended Answer to Interrogatory No. 17.

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79. There is no sales or use tax on direct mail advertising sent into D.C. from outside D.C. Tr. at 34, 94.

CONCLUSIONS OF LAW

1. The District of Columbia has collected sales and use taxes with interest from the Petitioner. The challenged taxes were assessed on advertising supplements printed in Connecticut and in the District of Columbia, and distributed with the local newspapers. The supplements advertised Petitioner's merchandise. The Petitioner seeks a refund of the taxes and interest collected by the District of Columbia. The District of Columbia bases its authority for the collection of said taxes on the District of Columbia Sales Tax Act, Sections 47-2601, et seq., D.C. Code (1973 Ed.), and the District of Columbia Use Tax Act, Sections 47-2701, et seq., D.C. Code (1973 Ed.).

2. The evidence adduced at trial unequivocally demonstrates that the advertising supplements printed in Connecticut were printed by an independent printer and were consigned by the printer to the newspapers on bills of lading, delivered F.O.B. via common carrier to the local newspapers. The contract between each newspaper and the taxpayer provided that the advertising supplements became the property of the newspaper upon delivery to the newspaper. Simply stated, title passed to the newspaper on delivery.

3. The District of Columbia may not impose a sales or use tax on the advertising supplements while the advertising supplements are in Connecticut or while in transit to the District of Columbia. There is no taxable event occurring outside of the District of Columbia or inside the District of Columbia which would justify the imposition of a sales or use tax.

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4. Once the advertising supplements entered the District of Columbia, the Petitioner exercised no right, power or control over the advertising supplements. See Section 47-2701(b), D.C. Code (1973 Ed.); District of Columbia v. Bell & Co., 420 A.2d 1208 (D.C. Ct. App. 1980).

5. The Petitioner has not used, stored or consumed the advertising supplements in the District of Columbia. No taxable event, therefore, has occurred in the District of Columbia. Section 47-2701(1)(a), D.C. Code (1973 Ed.). Consequently, the advertising supplements are not subject to the imposition of a sales or use tax.

6. The advertising supplements were incorporated into the newspapers and published and distributed as part of the newspapers. Sears, Roebuck and Co. v. State Tax Commission, 345 N.E.2d 893, 895 (1976).

7. An advertising supplement is a component of the newspaper and is not taxable under the District of Columbia Sales Tax Act or the District of Columbia Use Tax Act. The place where the printing of the advertising supplement occurred is unimportant. The legal result is the same whether the supplement is printed in the District of Columbia or outside of the District of Columbia.

8. The advertising supplements are unquestionably an integral part of the newspapers and are exempt from taxation under the District of Columbia Sales Tax Act and the District of Columbia Use Tax Act. Sections 47-2605(g) & 47-2706(b), D.C. Code (1973 Ed.); Sears, Roebuck and Co. v. State Tax Commission, supra and Friedman's Express, Inc. v. Mirror Transp. Co., 71 F. Supp. 991 (D.N.J. 1947), aff'd, 169 F.2d 504 (3d Cir. 1948).

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The District of Columbia Sales Tax Act, Section 47-2605, D.C. Code, provides:

> Gross receipts from the following sales shall be exempt from the tax imposed by this chapter:
>
> * * *
>
> (g) Sales of newspapers and publications of semi-public institutions as defined in paragraph 18 of Section 47-2601.

The District of Columbia Use Tax Act, Section 47-2706, supra, provides:

> The tax imposed by this chapter shall not apply to the following:
>
> * * *
>
> (b) Sales exempt from taxes imposed under Chapter 26 of this title.

The law of the District of Columbia is clear that the sale of newspapers are exempt from the D.C. Sales Tax, and where the sale is exempt the use is also exempt.

9. Having reviewed the trial transcript, the exhibits admitted into evidence and the Briefs filed by the parties and the amici curiae, and after hearing oral argument of counsel for both parties, the Court, sitting as the Trial Court, concludes that the Petitioner is entitled to a refund from the Respondent of Sales and Use Taxes in the amount of $47,934.93 and interest in the amount of $23,464.09 paid by the Petitoner on February 16, 1977, with interest at four per cent (4%) per annum owed to the Petitioner from the date of the overpayment to the date the refund is paid to Petitioner. (Section 47-2618, D.C. Code, 1973 Ed.).

10. Concerning the Petitioner's Motion for Summary Judgment and the Respondent's Opposition thereto, the Court notes that at the conclusion of the trial (page 251 of the trial

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transcript) the following colloquy occurred between the Court and Respondent's counsel:

> THE COURT: ... [T]here is really no factual dispute, because the Government hasn't offered anything to controvert those facts, so the facts are pretty well set: are they not?
>
> MR. AMATO (for Respondent): Yes, Your Honor, they are.

The original judge who tried this matter noted in his letter to counsel of May 11, 1979 that:

> There is really no dispute as to the facts in the case even though the Court took testimony in this regard. I find that the findings of fact set forth by counsel for the petitioner in its brief is accurate based upon what has been submitted and heard by the Court.

11. The Court concludes that there are no genuine issues as to any material facts. Indeed, there does not appear to be any factual dispute. The Court finds, based upon the foregoing Findings of Fact, Conclusions of Law, and its Opinion entered March 26, 1981, which is incorporated herein by reference, that the Petitioner, as a matter of law, is entitled to Summary Judgment.

WHEREFORE, the Court enters the foregoing Findings of Fact and Conclusions of Law, this 15 day of [illegible], 1981.

JUDGE JOHN D. FAUNTLEROY

Submitted By:

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